IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 18, 2007 Session

STATE OF TENNESSEE v. FRANKLIN DOUG SWEENEY, JR.

Appeal from the Criminal Court for Davidson County
No. 2006-A-2 Seth W. Norman, Judge

No. M2006-02581-CCA-R3-CD - Filed June 16, 2008

Appellant, Franklin Doug Sweeney, Jr., was indicted by the Davidson County Grand Jury for one count of arson and one count of vandalism of property valued at over $60,000. Appellant was found guilty by a jury of both charges. The trial court sentenced Appellant to three years for arson and eight years for vandalism as a Range I standard offender. After the denial of a motion for new trial, Appellant sought an appeal. On appeal, Appellant contends that: (1) the trial court erred by failing to allow Appellant to cross-examine witnesses on various issues; (2) Appellant cannot be convicted of vandalizing property in which he has a possessory interest; (3) the trial court should have instructed the jury to reduce the value of the property vandalized by the amount of Appellant's interest in the property; and (4) the trial court erred by denying alternative sentencing. Following a review of the record and the parties briefs, we conclude that the trial court properly ruled on evidentiary issues, that the evidence supported the convictions, and that the trial court properly denied alternative sentencing. Further, we conclude that the trial court's failure to instruct the jury as to the effect of Appellant's interest in the value of the property vandalized was harmless error. Accordingly, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Trial Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID G. HAYES, and THOMAS T. WOODALL, JJ., joined.

Mark C. Scruggs, Nashville, Tennessee, for the appellant, Franklin Doug Sweeney, Jr.

Robert E. Cooper, Jr., Attorney General & Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Sharon Reddick, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

Factual Background

Appellant and Michelle Lee Sweeney Davis were married on December 13, 1997. They lived together in a house located at 233 Clear Lake Drive in Nashville, which Mrs. Davis[1] and her children occupied prior to the marriage. Mrs. Davis had three children from previous relationships as well as a son with Appellant. In July of 2002, Appellant moved out of the house and filed for divorce. Mrs. Davis and Appellant attempted to reconcile their relationship in the fall of 2002, but their attempts were unsuccessful. During this time, the divorce proceeding was dismissed by a trial court for failure to prosecute. Mrs. Davis filed for divorce in August of 2004. In November of 2004, Appellant moved all of his belongings out of the house, except for a few small items.

On May 9, 2005, at around 10:30 a.m., Mrs. Davis received a telephone call at work informing her that there was an emergency at her house. When she arrived at the house, it was on fire and all four tires on her son's car had been slashed.

In January of 2006, Appellant was indicted by the Davidson County Grand Jury for arson and vandalism for his role in the destruction of Mrs. Davis's house.[2]

State's Proof

At trial, Mrs. Davis testified that the house on Clear Lake Drive belonged to her and her late husband, Mr. Riglowski, and that she became the sole owner of the property when he died on January 19, 1997. Mrs. Davis also stated that she took out a second mortgage on the house after she married Appellant, and Appellant co-signed on the loan. As of June 2005, there was a first mortgage on the house in the amount of $91,000 and a second mortgage in the amount of $12,000. Mrs. Davis testified that the second mortgage was acquired in order to consolidate debts. Mrs. Davis admitted that Appellant had an interest in an oak end table that was purchased for $949 in 2000, as well as a 32-inch Sony television, a cedar chest, and a few other items.

Mrs. Davis testified that she met her current husband,[3] John Davis, at a party in April of 2005. They started seeing each other soon thereafter. On May 2, 2005, Mrs. Davis's youngest son, whom she shared with Appellant, had a baseball game, and she invited Mr. Davis to attend the game.

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[1] At the time of trial, Mrs. Davis was married to a man named John Davis.

[2] We note that Appellant was convicted for the arson of the residence as well as vandalism of not only the contents of the residence, for the residence itself. While there is arguably a double jeopardy issue with respect to these dual convictions, Appellant does not raise such an issue. Given the facts that the record reflects that the contents of the residence alone were valued at well over $60,000, and that Appellant received concurrent sentences, addressing this issue as plain error is not necessary to substantial justice. *See State v. Bledsoe*, 226 S.W.3d 349, 354 (Tenn. 2007) (holding discretionary plain error review should be declared only when, *inter alia*, it is necessary to do substantial justice.

[3] It is unclear from the record when Mr. and Mrs. Davis got married.

Appellant came to the game and made "harass[ing] remarks" to Mrs. Davis. At one point during the baseball game, Mr. Davis went to the restroom. Appellant followed him there and initiated "some kind of confrontation."

The next day, Mr. Davis went to eat dinner and watch a movie at Mrs. Davis's house. When Mr. Davis got ready to leave, he discovered that someone had slashed all four of the tires on his truck. Mrs. Davis stated at trial that the tires on her car had already been slashed two times prior to this incident. Mrs. Davis thought that Appellant was responsible for slashing the tires, so on May 4, 2005, she filed an Order of Protection against Appellant.

On May 4, Mrs. Davis saw Appellant outside her home "snapping pictures" from his car while Mr. Davis was changing the tires on his truck. Then, Mrs. Davis stated that she saw Appellant jumping over a fence near her back yard so that he could take more pictures of her house and Mr. Davis's truck. Mrs. Davis asked Appellant what he was doing and he replied, "[D]on't worry about it, I'm not on your property." Mrs. Davis called the police, but they informed her that they could not do anything to Appellant because they had not yet served him with the Order of Protection. As a result of Appellant's actions, Mrs. Davis had a surveillance camera installed at her house on May 7, 2005.

Mrs. Davis testified that on May 9, a friend from work picked up her and her son at their house, took her son to day care, and then took her to work. Mrs. Davis needed a ride to work because her son's green Mazda MX-6, the car she had been driving, was broken down in the driveway. Mrs. Davis's twelve-year-old son remained at the house to wait for the school bus. Around 10:30 that morning, Mrs. Davis's supervisor informed her that she had an emergency at her house.

When Mrs. Davis arrived at her house, it was on fire. She also noticed that the tires on the Mazda had been slashed. Several days after the fire, Mrs. Davis was allowed to enter the house. She discovered that certain things in the house were not as she had left them on the morning prior to the fire. For example, the "secret drawers" in her bedroom furniture had been pulled out and the jewelry that she kept in them was missing. The jewelry included some "ruby diamonds" as well as things that her father left her when he passed away. According to Mrs. Davis, Appellant was the only other person that knew about the "secret drawers." Additionally, some collectible plates that belonged to Appellant were missing as well as two small plaques that Mrs. Davis referred to as a "Code of Arms."

Nancy Wilson lived next door to Mrs. Davis at the time of the fire. She moved next door to Mrs. Davis in 2003. From her dining room window, Mrs. Davis could see the garage side of Mrs. Davis's house and the driveway. Mrs. Wilson testified that although she was never "properly introduced" to Appellant, she had spoken to him on four or five occasions. She knew that Appellant was the father of Mrs. Davis's youngest child. Mrs. Wilson stated that Appellant was easy to recognize because of "his tattoo and his facial hairs."

At some point, Mrs. Davis asked Mrs. Wilson to let her know if anyone, especially Appellant, was at her house when she was not home. Mrs. Wilson operated a day care facility out of her home, so she was home all day long.

Mrs. Wilson saw Appellant jump over the fence in Mrs. Wilson's yard on May 4, 2005. Appellant was yelling and cursing "several times" at Mrs. Davis. Appellant asked Mrs. Davis, "[W]hat are you going to do now, B?" Mrs. Davis told Appellant he was not supposed to be there.

On the day of the fire, Mrs. Wilson saw Appellant drive up Mrs. Davis's driveway in a silver car and park by the garage. Mrs. Wilson was standing in her dining room at the time. She got the phone and tried to get in touch with Mrs. Davis. She was unable to reach Mrs. Davis by telephone. When she looked back at Mrs. Davis's house, she saw Appellant "running out of the garage and this big blaze came out behind him." Mrs. Wilson called 911.

The police later brought a photographic lineup to Mrs. Wilson. She was unable to identify Appellant from the group of photographs, claiming that all of the individuals looked alike. Mrs. Wilson did pick out two individuals in the lineup that she thought looked most like Appellant. Mrs. Wilson identified Appellant at trial as the man she saw entering Mrs. Davis's house immediately preceding the fire.

Assistant Fire Marshall William Smotherman with the Nashville Fire Department responded to the fire at Mrs. Davis's house. The house was "fully involved in flame" when he arrived at around 10:30 a.m. According to Mr. Smotherman, two separate fires were started at Mrs. Davis's house. He was able to determine that one fire originated in the garage and one fire originated in the front right bedroom. He was unable to connect the fires and, therefore, concluded that the two fires were independent. The fire that started in the bedroom appeared to have been started on the bed, where most of the damage occurred. Mr. Smotherman was unable to locate an ignition source for either fire. The damage to the garage was so extensive that Mr. Smotherman was unable to determine the point of ignition. Based on the fact that he could not find an ignition source and the fact that the two fires occurred simultaneously, Mr. Smotherman opined that the fires were both set deliberately. As a result of the fire, the house was nearly completely destroyed.

Around noon on the day of the fire, Mr. Smotherman and Officer Todd Mask of the Metropolitan Nashville Bomb Squad visited Appellant at his place of employment, a tattoo shop owned by his mother. Mr. Smotherman located an "older gray car" in the parking lot before entering the tattoo shop and asking for Appellant. The two men were told that Appellant was busy. Appellant eventually came out to speak with Mr. Smotherman and the officer about twenty minutes later. They informed Appellant about the fire at Mrs. Davis's house. Appellant acted "surprised" and said that he did not know anything about the fire and that he had not been to Mrs. Davis's house that day. Mr. Smotherman attempted to set up a meeting with Appellant the following day. Appellant agreed to meet at the Police Department on May 11, but did not show up for that meeting. After Appellant failed to show for the meeting, Mr. Smotherman again tried to contact Appellant. This time, Mr. Smotherman spoke with Appellant's mother. Appellant's mother informed Mr.

Smotherman that Appellant left their home at around 10:00 a.m. on the morning of the fire and that he would not have had time to go to Mrs. Davis's house and still be at work on time at 10:30 a.m.

Officer Mask testified that he assisted in the investigation of the fire and accompanied Mr. Smotherman to interview Appellant. According to Officer Mask, when Appellant was confronted about the fire, he was "kind of [in] disbelief that the event had happened" and "emphatically stated that no, he was no where [sic] near that residence any time that part of the day." Officer Mask noted that there was a car in the parking lot of the tattoo shop that matched the description of the car that was seen leaving the scene of the fire. That car belonged to Appellant.

Appellant's Proof

Guy Deadman, Appellant's stepfather, testified at trial. According to Mr. Deadman, Appellant was living at his home in Smyrna at the time of the fire. He opined that it would take about thirty to thirty-five minutes to drive from his home in Smyrna to Mrs. Davis's house, depending on traffic.

On the day of the fire, Mr. Deadman "specifically" remembered that he got out of bed between 7:00 and 7:30 a.m. Appellant was downstairs at around 8:00 a.m. Mr. Deadman, his wife, and Appellant sat on the couch drinking coffee and smoking cigarettes until around 10:50 a.m., when Appellant left to go to work. Mr. Deadman stated that he looked at the clock on his cable box as Appellant walked out the door. On cross-examination, Mr. Deadman denied that he told someone at the District Attorney's office that Appellant left for work that day at around 11:45 a.m.

Pat Deadman, Appellant's mother, testified that Appellant worked at her tattoo shop on Bell Road. Appellant had a back problem, and Mrs. Deadman complained that Appellant's job performance was hindered due to his back issues. Mrs. Deadman stated that she got up at around 6:30 or 7:00 a.m. on the morning of the fire and then sat around, drinking coffee and smoking with Mr. Deadman and Appellant. Appellant left the house "[s]hortly before 11:00" so that he could get to the tattoo shop before 11:30.

Mrs. Deadman remembered talking to Mr. Smotherman about meeting with Appellant. She called Mr. Smotherman to inform him that Appellant would be unable to meet with him. Mrs. Deadman testified that she even tried to reschedule the appointment for another day and time.

Dr. Christina Addison, an internist, testified as Appellant's doctor. According to Dr. Addison, Appellant was referred to her by a back surgeon for maintenance of pain and status post-surgery. Appellant had sustained a thoracic spinal fracture of the eleventh and twelfth vertebrae, for which he had surgery. The surgery fused four of Appellant's vertebrae together. Prior to the surgery, Dr. Addison testified that Appellant would have had "severe" back pain that would have limited his ability to lift, bend, run, or walk fast. She did not think that Appellant would have been able to jump a fence but did not have an opinion as to whether Appellant would have been able to crawl under a garage door.

Appellant took the stand in his own behalf. Appellant testified that he filed for divorce in 2002 after "constant arguing." Mrs. Davis was given custody of their son, and he was granted visitation. During the marriage, Appellant helped to pay the mortgage and other bills.

Appellant agreed that he and Mrs. Davis attempted to reconcile but that the relationship did not work. Mrs. Davis eventually filed for divorce in 2004. After that time, Appellant got a restraining order, prohibiting Mrs. Davis from taking their son around any of her "paramours." Appellant denied slashing any tires at Mrs. Davis's house on March 29, 2005, the day of the mediation of the divorce case. Further, Appellant stated that he did not harass Mr. and Mrs. Davis at the baseball game, he merely wanted to meet the man that was spending time with his son. Appellant testified that "there was no negativity."

On May 4, 2005, Appellant testified that he had visitation with his son from 3:00 to 6:00 p.m. At that time, he dropped his son off at the house. He noticed Mr. Davis's vehicle in the driveway. Appellant admitted that he took a picture of Mr. Davis and the vehicle, as well as the back of the house. Appellant denied jumping Mrs. Wilson's fence to take the pictures and claimed that he could not do so due to his back condition. Appellant also denied meeting Mrs. Wilson but admitted that he "may have thrown [his] hand up [to her] a time or two in the yard." Appellant claimed that he had not been back to Mrs. Davis's house since May 4, 2005.

On the morning of the fire, Appellant claimed that he woke up around 7:30 a.m. and had coffee and cigarettes with his parents before going to work at around "10 or 11 minutes to 11:00 [a.m.]" Appellant stated that he arrived at the tattoo shop around 11:25 a.m. and his brother Shane, who was already there, let him in to the shop.

Appellant stated that he learned of the fire when Mr. Smotherman and Officer Mask came to interview him at work. He asked "who could have done such a thing" when he learned of the fire and did not think to ask if anyone was hurt because he was in "shock."

At the conclusion of the proof, the jury found Appellant guilty of both arson and vandalism. After a sentencing hearing, the trial court sentenced Appellant to three years for arson and eight years for vandalism. The trial court denied a motion for new trial, and this appeal followed. Appellant raises various issues for our review: (1) whether the trial court erred when it did not allow Appellant to cross-examine the victim and the eye-witness on various issues; (2) whether Appellant could be convicted of vandalizing property in which he has a possessory interest; and (3) whether the trial court erred by denying alternative sentencing.

Analysis

Cross-examination of Witnesses

First, Appellant claims that the trial court erred by refusing to allow counsel for Appellant to cross-examine Mrs. Davis on "numerous occasions regarding various issues surrounding the divorce, such as her infidelity and custody issues." Specifically, Appellant sought to cross-examine

Mrs. Davis about her infidelity and financial issues in the divorce, to "provide a motive for her to have destroyed the house." Further, Appellant argues that the trial court erred in refusing to allow Appellant to cross-examine Mrs. Wilson about the status of her license for home-based childcare. Appellant cites this Court's opinion in *State v. Daniel E. Pottebaum, Sr.*, No. M2004-02733-CCA-R3-CD, 2006 WL 1222710 (Tenn. Crim. App., at Nashville, May 5, 2006), to support his argument. Appellant argues that according to *Daniel E. Pottebaum, Sr.*, it is a "denial of due process . . . to prevent [a defendant] from fully cross-examining witnesses crucial to the State's case regarding matters of credibility." The State disagrees, arguing that the trial court properly exercised its discretion in the admission of relevant testimony.

We agree with Appellant that the right to cross-examine witnesses is an important and often crucial component of a successful defense and that this Court examined that right in *Daniel E. Pottebaum, Sr.* 2006 WL 122710, at *3-4. In *Daniel E. Pottebaum, Sr.*, this Court examined the right of the defendant to cross-examine the victim of child rape about her prior accusation of sexual abuse. *Id.* at *3-8. This Court reversed and remanded Appellant's convictions for a new trial because we concluded that the credibility of the victim was a "central issue, [in that] the victim's previous participation in a crime involving dishonesty was especially probative" and "may have changed the results of the trial" such that "[t]he importance of a full and complete cross-examination, . . . is so fundamental as to preclude a finding of harmless error." *Id.* at *8.

It is well-settled that the Confrontation Clause of the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution provide two protections for criminal defendants: the right to physically face witnesses and the right to cross-examine witnesses. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *see also State v. Middlebrooks*, 840 S.W.2d 317, 332 (Tenn. 1992). These constitutional rights include the right to conduct meaningful cross-examination of witnesses. *Ritchie*, 480 U.S. at 51; *State v. Brown*, 29 S.W.3d 427, 431 (Tenn. 2000); *Middlebrooks*, 840 S.W.2d at 332. Denial of the right to effective cross-examination of witnesses amounts to "'constitutional error of the first magnitude'" and may violate the defendant's right to a fair trial. *State v. Hill*, 598 S.W.2d 815, 819 (Tenn. Crim. App. 1980) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). However, we observe that "[t]rial judges are empowered with great discretion regarding the trial process, including the scope of cross-examination," and that such "discretion will not be disturbed unless an abuse" thereof is found. *State v. Williams*, 929 S.W.2d 385, 389 (Tenn. Crim. App. 1996). Additionally, the trial court can, and often does, impose limits on cross-examination. *State v. Reid*, 882 S.W.2d 423, 430 (Tenn. Crim. App. 1994). These limits can "take into account such factors as harassment, prejudice, issue confrontation, witness safety, or merely repetitive or marginally relevant interrogation." *Id.* Limits that are imposed on cross-examination will not be overturned for an abuse of discretion unless the trial court is unreasonably restrictive of the right to cross-examination. *State v. Dishman*, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995).

In the case herein, Appellant complains that the trial court did not allow him to cross-examine Mrs. Davis regarding her financial status and her infidelity. Our review of the record conflicts with Appellant's characterization of the latitude given by the trial court during the cross-

examination of Mrs. Davis concerning her financial situation. A reading of the transcript reveals that counsel for Appellant questioned Mrs. Davis extensively regarding her income, expenses, debt, assets, and insurance settlement money that she received as a result of the fire. Further, counsel for Appellant questioned Mrs. Davis about inconsistencies between the information she provided to the insurance company about her losses and the testimony she gave during divorce proceedings regarding the marital property. The record demonstrates that counsel for Appellant was given wide latitude during cross-examination of Mrs. Davis. This issue is without merit.

As to Mrs. Davis's alleged infidelity, the trial court ruled that the issue was not relevant to the jury's determination of whether Appellant set fire to the house. We agree. The trial court did not abuse its discretion in this regard. This issue is without merit.

Finally, Appellant argues that he should have been allowed to question Mrs. Davis about her son Kevin, whom he speculates may have had "enemies" that could have been responsible for the fire. At trial, Appellant made an offer of proof, but was unable to elicit testimony from Mrs. Davis that would have supported his speculation. We determine that the trial court did not abuse its discretion in excluding this irrelevant, speculative evidence.

Similarly, Appellant also contends that the trial court erred by refusing to allow him to cross-examine Mrs. Wilson regarding the licensure of her home day care for the purpose of attacking her credibility. At trial, the trial court conducted a jury-out hearing to delve into whether the defense would be allowed to cross-examine Mrs. Wilson regarding issues that Appellant alleged related to her credibility as a witness. Specifically, during the hearing, Mrs. Wilson testified that her day care was initially registered with the State, but that the State later "cut out" the registration requirement for her home day care. Mrs. Wilson testified that her registration requirement "ended" but that she was still "registered" in Tennessee. Counsel for Appellant argued that Mrs. Wilson's file was "closed" in April of 2004. The trial court asked counsel for Appellant what "file" was being referred to as "closed." Counsel for Appellant conceded that he was unable to show that Mrs. Wilson's testimony was false. We conclude that the trial court did not abuse its discretion in excluding this potentially misleading and confusing evidence with unproven relevance to Ms. Wilson's credibility. This issue is without merit.

Vandalism Conviction

Appellant argues that as a matter of law, he cannot be convicted of vandalism of property in which he has a property interest. Specifically, Appellant contends that because he and Mrs. Davis were married at the time of the fire, he had a marital interest in the house as well as certain personal property contained in the house. In other words, he asserts that Tennessee Code Annotated section 39-14-408 prohibits his conviction for vandalism of property for property that he owned. Appellant also argues that the trial court erred by not instructing the jury to deduct the value of his interest in

the property from the total property value in order to determine the value of the property vandalized.[4] The State disagrees, arguing that "any interest [Appellant] allegedly had in the property would merely be deducted from the value of the vandalized property," so Appellant would still be guilty of vandalism of property valued at over $60,000 even if such a deduction was made.

Tennessee Code Annotated section 39-14-408(a) states that a person who, "knowingly causes damage to or the destruction of any real or personal property of another . . . knowing that the person does not have the owner's effective consent . . ." is guilty of vandalism. Under Tennessee Code Annotated section 39-14-408, damage is "destroying, polluting or contaminating property." Acts of vandalism "are to be valued according to the provisions of § 39-11-106(a)(36) and punished as theft under § 39-14-105." T.C.A. § 39-14-408(c).

Tennessee Code Annotated section 39-11-106 provides definitions for criminal offenses. Specifically, Tennessee Code Annotated section 39-11-106(a)(36) defines "[v]alue" as follows:

> (A) Subject to the additional criteria of subdivisions (a)(36)(B)-(D), "value" under this title means:
> (i) The fair market value of the property or service at the time and place of the offense; or
> (ii) If the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense;
>
> . . . .
>
> (D) If the defendant gave consideration for or had a legal interest in the property or service that is the object of the offense, *the amount of consideration or value of the interest shall be deducted from the value of the property or service ascertained under subdivision (a)(36)(A), (B) or (C) to determine value*.

(emphasis added).

First of all, we conclude contrary to Appellant's suggestion, that the legislature did not intend to absolve persons from criminal liability for vandalism merely because they have a possessory interest in the property vandalized. The statute prohibits the "damage" or "destruction" of property without the "owner's" consent. If we are to accept Appellant's assertion that he could not be guilty of vandalism because he had a possessory interest in the house at the time of the fire because he was still married to Mrs. Davis, Appellant would still not have the "owner's" consent to destroy the house and its contents as the house would be owned by both Mrs. Davis and Appellant. There is no testimony in the record to indicate that Mrs. Davis consented to the vandalism of the house. Moreover, the provision of Tennessee Code Annotated section 39-11-106(a)(36)(D) providing for

[4] The issue regarding jury instructions arose during oral argument. According to an order entered by this Court on September 27, 2007, Appellant was permitted to file a supplemental record that included the jury instructions and a brief on the issue.

a deduction in value calculation, but not absolution from criminal liability belie Appellant's contention.

With respect to the determination of value, however, we acknowledge that the trial court has a duty to "give a complete charge of the law applicable to the facts of a case." *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986); *see also* Tenn. R. Crim. P. 30. "[The] defendant has a constitutional right to a correct and complete charge of the law." *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990). Erroneous jury instructions require a reversal, unless the error is harmless beyond a reasonable doubt. *See Welch v. State*, 836 S.W.2d 586, 591 (Tenn. Crim. App. 1992).

Our review of the record indicates that Appellant never requested a jury instruction on value, as he was required to do when the trial court did not give one. The State also correctly points out that this issue has not been raised by Appellant prior to this appeal.[5] When an issue is raised for the first time on appeal, it is typically waived. *State v. Alvarado*, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). Rule 3(e) of the Tennessee Rules of Appellate Procedure provides:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, *jury instructions granted or refused*, misconduct of jurors, parties or counsel, or other action upon which a new trial is sought, *unless the same was specifically stated in a motion for new trial*; otherwise such issues will be treated as waived.

Tenn. R. App. P. 3(e) (emphasis added); *see also State v. Martin*, 940 S.W.2d 567, 569 (Tenn.1997) (holding that a defendant relinquishes the right to argue on appeal any issues that should have been presented in a motion for new trial). A panel of this Court has previously held that pursuant to Rule 3(e) "the failure to file a motion for a new trial, the late filing of a motion for a new trial, and the failure to include an issue in a motion for a new trial results in waiver of all issues which, if found to be meritorious, would result in the granting of a new trial." *State v. Keel*, 882 S.W.2d 410, 416 (Tenn. Crim. App. 1994) (footnote omitted). This issue is waived due to Appellant's failure to request such an instruction at trial and raise the issue in a motion for new trial.

Despite the waiver, Appellant asks this Court to review the issue for plain error under Tennessee Rule of Criminal Procedure 52(b). Appellate courts are advised to use plain error sparingly in recognizing errors that have not been raised by the parties or have been waived due to a procedural default. *State v. Bledsoe*, 226 S.W.3d 349, 354 (Tenn. 2007). We decline to address this issue for plain error because it is not necessary to do substantial justice. Appellant was indicted

[5] We note that there was some discussion of whether Appellant could be held liable for vandalizing property in which he had an interest at trial during the argument on the motion for judgment of acquittal and subsequently at the hearing on the motion for new trial, but counsel for Appellant never specifically requested an instruction on Tennessee Code Annotated section 39-11-106(a)(36)(D).

for vandalism of property valued at more than $60,000. The proof at trial showed that Appellant and Mrs. Davis were still married at the time of the fire. Further, there was evidence that the house was valued at $185,000. There was also evidence introduced that Appellant had an interest in several items that remained in the house at the time of the fire: (1) a couch valued at $600; (2) an end table purchased for $949; (3) a television valued at $500; (4) a television valued at $400; (5) a cedar chest valued at $40; and (6) a dart board valued at $150. Dividing the value of the residence in half as a marital asset, Appellant could be viewed as having an interest of $92,500 in the house plus an additional $1,319.50 interest in the items listed above.[6] Adding these two figures together gives Appellant a $93,819.50 interest in the house and the contents. This means that Mrs. Davis had at least a $92,500 interest in the house itself, not counting any of the contents. Thus, even if Appellant was credited with half of the value of the residence and its contents as marital property in which he had an interest, he could still be convicted of vandalism of property valued at more than $60,000. The trial court's failure to instruct the jury on the definition of value was, therefore, harmless error.

Sufficiency of the Evidence

Appellant next challenges the sufficiency of the evidence by arguing that the only witness against him was Mrs. Wison, who was "repeatedly impeached during her testimony." The State contends that Appellant's challenge to the sufficiency of the evidence is "merely an attack on Ms. Wilson's credibility," so Appellant is not entitled to relief.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S .W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

[6] This amount is the total value of the items listed divided by two.

Appellant was convicted of arson and vandalism. As stated previously, vandalism occurs when a person "knowingly causes damage to or the destruction of any real or personal property of another . . . knowing that the person does not have the owner's effective consent . . . ." T.C.A. § 39-14-408(a). Tennessee Code Annotated section 39-14-301 defines arson as "knowingly damag[ing] any structure by means of a fire or explosion: (1)[w]ithout the consent of all persons who have a possessory, proprietary or security interest therein . . . ." T.C.A. § 39-14-301(a)(1).

Appellant's sole complaint with respect to the evidence is that the eyewitness, Mrs. Wilson, was not credible because she was "repeatedly impeached" at trial. As noted previously, the jury alone assesses the credibility of the witnesses and resolves the factual disputes at trial. *Odom*, 928 S.W.2d at 23. Furthermore, Mrs. Wilson was insistent that it was Appellant she saw exiting the house immediately prior to the fire. She recognized his tattoos, facial hair, vehicle, and "physical stature." In fact, she had "no hesitation at all" that it was Appellant she saw out of her dining room window that day. There was sufficient evidence for the jury to convict Appellant of arson and vandalism. Appellant is not entitled to relief on this issue.

Alternative Sentencing

Finally, Appellant argues that the trial court erred by refusing to grant some form of alternative sentencing. The State disagrees, noting that Appellant was not entitled to a presumption in favor of alternative sentencing and that the trial court properly determined that Appellant displayed an ongoing threat to Mrs. Davis and confinement was necessary to protect Mrs. Davis from Appellant.

In regards to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.

A defendant "who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing in the absence of evidence to the contrary." T.C.A. § 40-35-102(6).

Appellant herein was convicted of Class B felony vandalism and arson, a Class C felony. Thus, he was not entitled to the presumption that he was a favorable candidate for alternative sentencing. *See* T.C.A. § 40-35-102(6). *See also State v. Fields*, 40 S.W.3d 435, 440 (Tenn. 2001).

However, as a Range I, Standard Offender convicted of and sentenced to less than eight years for the offenses, Appellant was eligible for probation. *See* T.C.A. §§ 40-35-102(6) & -303(a); *State v. Byrd*, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 1993). However, a defendant seeking full probation must specifically establish suitability for full probation, as distinguished from eligibility for alternative sentencing in general. *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999). In determining whether to grant probation, a trial court should consider the circumstances of the offense, the defendant's criminal record, the defendant's social history and present conditions, the need for deterrence and the best interest of both the defendant and the public. *State v. Boyd*, 925 S.W.2d 237, 244 (Tenn. Crim. App. 1995).

On appeal, Appellant merely argues that the trial court "never even considered any type of alternative sentencing" and that because there were no enhancement or mitigating factors found by the trial court, the sentences were "not consistent with the goals and purposes of the sentencing statute[s]." Appellant does not cite any authority for these propositions. Neither does he appear to have offered any proof supporting consideration of an alternative sentence. We agree with the trial court in the case herein. In denying an alternative sentence, the trial court expressed its concern for the safety and security of Mrs. Davis, stating that he was "in fear for this lady" because there was "testimony that [Appellant] violated an Order of Protection in this case, and [Mrs. Davis] has a right to some peace as far as I'm concerned under the law." Appellant has not shown on appeal that the evidence preponderates against the trial court's denial of alternative sentencing. Appellant is not entitled to relief on this issue.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE